(1)

Supreme Court, U.S.
FILED

031635 JUN 2 - 2004

NO. _____

IN THE

Supreme Court of the United States

CURTIS SHAFFER
Petitioner

v.

THE UNITED STATES
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Federal Circuit Erred in Holding That a Resort to Administrative Remedies Does Not Toll the Statute of Limitations When This Unique Position is In Conflict With the Other Circuit Courts of Appeal

II Whether a Reservist Can Maintain a Cause of Action for Military Pay if He is the Victim of an Improper Discharge

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BASIS FOR JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Federal Circuit was entered on March 8, 2004. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

CORPORATE DISCLOSURE STATEMENT

This document has not been filed on behalf of a nongovernmental corporation within the scope of Rule 29.6

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

10 U.S.C. § 938

10 U.S.C. § 1552.

10 U.S.C. § 1557

10 U.S.C. § 1558

10 U.S.C. § 10147

28 U.S.C. § 1254

37 U.S.C. § 101

37 U.S.C. § 204

37 U.S.C. § 206

32 C.F.R. § 723.3

Pertinent text of citations are set out in the appendix.

STATEMENT OF THE CASE

Curtis Shaffer was hired by the Army Reserves as a "dual status technician" on July 24, 1983. As a condition of employment, plaintiff was required to maintain an Army Reserve unit military membership. Shafer was a career reservist who has served his country loyally and with honor.

In February of 1991, Shaffer applied and was selected for a civilian position associated with a Master Sergeant (E-8) Army Reserve position with the 3291st USARF School. He never accepted the position but was still promoted to Master Sergeant (E-8) on 20 February 1991. On March 25, 1992, he was relocated to Miami Florida to accept another position. This billet was a GS-9 civilian and Sergeant First Class (SFC) (E-7) military position.

In April 1992 orders were issued rescinding his promotion and returning him to the grade of E-7 but through an oversight, the orders were not sent to Shaffer. On July 16, 1992, Shaffer was directed to stop wearing the E-8 designation and to display E-7 rank indicators. He immediately complied.
On August 5, 1992, he finally received the orders rescinding his advancement.

On September 18, 1992, Shaffer made a protected communication to Congressman Dante Fascell. On January 15, 1993, he received a letter of reprimand which was filed in his permanent record. On February 23, 1993, plaintiff made another protected communication to the Commander, 81st U. S. Army Reserve Command requesting a formal investigation into the matter. The communication was referred to the Inspector General.

In reprisal for the protected communications, the 302nd Military Intelligence company issued a separation order indicating an intent to separate plaintiff from the military service. Shaffer then submitted a complaint of wrongs pursuant to Art. 138 of the Uniform Code of Military Justice (10 U.S.C. § 938). It was denied on August 12, 1993.

On October 13, 1993, a board of officers was convened at the Headquarters, 125th Army Reserve Command, to consider whether Shaffer committed misconduct and whether he should be retained or separated. The board voted 2-1 to find misconduct only for improperly wearing rank insignia and recommended separation under honorable conditions.

On December 13, 1993, plaintiff was discharged from the Reserves with a general discharge under honorable conditions. On April 2, 1994, plaintiff was terminated from his civilian position with the Army because of his failure to maintain membership in the Reserves.

On November 19, 1994, plaintiff submitted an application for correction of records to the Army Board for Correction of Military Records.
He then filed a *pro se* complaint in the United States District Court for the Western District of Tennessee (96-2204) seeking relief *inter alia* under the Fifth Amendment to the Constitution and requesting that his discharge be set aside. The court dismissed the suit for failure to exhaust administrative remedies on March 7, 1997. On June 19, 1997, the Army Discharge Review Board refused to upgrade plaintiff's discharge. On February 25, 1998, the Army Board for Correction of Military Records refused to correct his record.

The United States Court of Appeals for the Sixth Circuit affirmed the district court on May 1, 1998.

The instant action was filed in the United States Court of Federal Claims on October 20, 2000. That court dismissed his suit on September 28, 2001. A timely notice of appal was filed in the United States Court of Appeals for the Federal Circuit. The matter was stayed pending the outcome in the case of *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) *cert. denied* 124 S.Ct. 1404 (2004).

ARGUMENT

I. The Federal Circuit Erred in Holding That a Resort to Administrative Remedies Does Not Toll the Statute of Limitations When This Unique Position is In Conflict With the Other Circuit Courts of Appeal

A. The Weight of Opinion Is That Referral to the Correction Board Is a Mandatory Administrative Requirement

The issue in this case is ripe for review pursuant to Rules 10(a) and (c) of the Rules of the Supreme Court of the United States. The Federal Circuit stands alone in their holding that the six year statute of limitations begins to run at the time of discharge rather than the completion of final action by the correction board or discharge review board. *Osborn v. United States*, 47 Fed. Cl. 224, 233 (2000). *See*, *Martinez supra*. In *Martinez*, a divided Federal Circuit, meeting *en banc*, reaffirmed their previous decision in *Hurick v. Lehman*, 782 F.2d 984 (1986). As discussed herein, *Hurick* was wrong when it was issued and is still wrong despite its reaffirmance in *Martinez*.

The Federal Circuit jurisprudence on this issue is against the weight of authority. Most federal courts throughout the nation require military members to resort to the exhaustion of administrative remedies articulated by *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). In the military context this requires a review of discharge proceedings by the service record correction board. *Champagne v. Schlesinger*, 506 F.2d 979 (7th Cir.1974); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir.1974); *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir.1971); *Linfors v. United States*, 673 F.2d 332 (11th Cir. 1982) (per curiam); *Horn v. Schlesinger*, 514 F.2d 549, 551 (8th Cir. 1975); *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991); *Blassingame v. Secretary of the Navy*, 811 F.2d 65, 71 (2d Cir.1987).

Although this Court has not addressed this matter directly, they have noted that the military correction boards are "final agency action." *Clinton v. Goldsmith*, 526 U.S. 529 (1999) In light of *Clinton*, this Court should re-examine the Federal Circuit rulings that exhausting remedies before a correction boards does not toll the statute of limitations. Reversal of this precedent would bring the Federal Circuit into agreement with the other circuits that have examined this matter.

If the resort to the correction board is mandatory, then the statute of limitations begins to run at the time of their final decision. *Ortiz v. Secretary of Defense*, 41 F.3d 738 (D.C. Cir. 1994); *Dougherty v. United States Navy Bd. for Correction of Naval Records*, 784 F.2d 499, 501 (3d Cir.1986); *Smith v. Marsh*, 787 F.2d 510, 512 (10th Cir.1986). The courts below have recognized that when pursuance of administrative remedies is a prerequisite to suit then the statute of limitations is suspended or tolled by such action. *Steel Improvement & Forge Co. v. United States*, 174

Ct.Cl. 24, 29, 355 F.2d 627, 631 (1966); *Gilmore v. United States*, 228 Ct.Cl. 829, 831 (1981).

The dispute between the Circuits continues to widen in light of *Martinez* and the current failure of the Federal Circuit to require exhaustion may act to deprive military members of that alternative in seeking to correct injustice. Prior to the enactment of the correction boards enabling statute, 10 U.S.C. § 1552, the Congress was inundated with private bills to correct records and injustice. The purpose of establishing correction boards was to provide for correction of military records and for review of discharges and dismissals. *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974), *on reh'g* 505 F.2d 857, *cert denied* 421 U.S. 1011. *See, also, Suro v. Padilla*, 441 F.Supp. 14 (D.C. Puerto Rico 1976). This administrative " body of last resort" freed Congress from dealing with individual applications for corrections of injustice to servicememebrs. *Sherengos v. Seamans*, 449 F.2d 333 (4th Cir. 1971).

Should the Federal Circuit position be upheld, it may jeopardize the military member's right to seek review under the correction board. Statutorily and by regulation, the applicant is required to submit his petition within three years of the date of the discovery of the injustice. 10 U.S.C. § 1552(b), 32 C.F.R. 723.3(b). Both the statute and the regulation provide for waiver in the interests of justice. *Id.* The courts have modified this provision, however. In *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1997), the court held that the statute of limitations does not begin to run until the applicant has left military service.

Congress has never adopted a firm time period for consideration of an application. In § 544 the 1999 Defense Appropriations Act, Congress enacted timeliness standards

for the military correction boards. PL 105-261, 112 Stat. 1920, 2021 (codified as 10 U.S.C. § 1557). This enactment required that 50 percent of all petitions received during the fiscal years 2001 and 2002 be decided within ten months of submission. The law requires increased percentages in subsequent years. Currently it is at 60 percent. While a court order may accelerate the process somewhat, there is no firm requirement for a correction board to complete action within a specified time frame.

Consequently, it is conceivable that the delays inherent in the correction board system could force the service member with a choice of remedies. The time standards are not mandatory and the correction board process can and has taken several years. In the instant case it took almost three and one half years for the correction board to render its decision. Unless the Federal Circuit is reversed, these type of time constraints could force a service member to abandon the preferred Congressional remedy and seek the more expensive and more difficult relief in the Court of Federal Claims.

Nor can it be said that the adoption of 10 U.S.C. § 1558 strengthens the Federal Circuit's position. Initially a plain reading of the statute seems to indicate that unless designated as a "special board" within the scope of 10 U.S.C. § 1558(b)(1)(A), a correction board is exempt from the statute. 10 U.S.C. § 1558(g)(2). Thus it is inapplicable to the present case.

This Court should grant certiorari in the instant case because it represents an unsettled area of the law that should be settled by this court. Since this Court's decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), several district courts have been confused as to the application of *Darby*. As

a result, the law has become increasingly unsettled with the decisions of many district courts in conflict with others. *Compare Saad v. Dalton*, 846 F.Supp 889 (1994) with *Perez v. United States,* 850 F.Supp 1354, 1360 (1994) and *Watson v. Perry*, 918 F.Supp 1403, 1411 (W.D. Wash. 1996). The effect of *Martinez*, *supra*, which claims that *Darby* applies in the district courts but not in the Court of Federal Claims has further heightened the confusion.

B Under the Law of the Case Doctrine, the Requirement to Seek Relief from the Correction Board and Discharge Review Board Was Mandatory

It is well settled that there are circumstances where recourse to a correction board becomes a mandatory remedy which must be exhausted before judicial review is available. *Cunningham v. United States*, 549 F.2d 753, 212 Ct.Cl. 451 (Ct.Cl.1977).

When Mr. Shaffer sought relief from the district court, his complaint was dismissed for failure to exhaust his administrative remedies by applying to the Army Board for Correction of Military Records (ABCMR) and Army Discharge Review Board (ADRB). The Sixth Circuit affirmed.[1] The plaintiff complied and sought to exhaust his administrative remedies. This case is really a continuation of the first case filed and dismissed in the district court. Consequently, their finding that Shaffer had to apply to the administrative boards was binding on the court below.

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[1] The Sixth Circuit did not explicitly address administrative remedies since the plaintiff had exhausted his remedies by the time the Sixth Circuit decided the case.

The court below found that the complaint filed in the Tennessee court would not have been actionable in the Court of Federal Claims. While the complaint filed in that court did not specifically articulate a cause of action under the Tucker Act, the various allegations constitute such a complaint. Shaffer filed his original suit *pro se*. Pro se litigants generally are entitled to a liberal construction of their pleadings, which should be read "to raise the strongest arguments that they suggest." *Green v. United States*, 260 F.3d 78, 83 (2nd Cir. 2001); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996); *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (holding that the allegations in a pro se complaint are "h[e]ld to less stringent standards than formal pleadings drafted by lawyers." In other words the court should apply "liberal construction" of the pleadings of individuals who proceed *pro se* "to give a *pro se* plaintiff a break when, although he stumbles on a technicality, his pleading is otherwise understandable." *Hudson v. McHugh*, 148 F.3d 859, 864 (7th Cir.1998).

The district court held that an application to the correction board and discharge review board was mandatory. This Court has found that federal courts should routinely apply law-of-the-case principles to transfer decisions of coordinate courts. *Christianson v. Colt Industries* 486 U.S. 800, 815 (1988).

Consequently, the instant case represents a controversy within the scope of Rule 10(a) since the actions of the court below are in direct conflict with the precedence and the mandate of the Sixth Circuit and its district court. Accordingly, granting certiorari on this issue is necessary to resolve the contradictions between the circuits.

C. Under the Doctrine of Equitable Tolling, the Statute of Limitations Should Not Be Allowed to Bar Plaintiff's Action

Under the doctrine of equitable tolling, a plaintiff may sue after the statute of limitations has expired if he was prevented from filing suit in a timely manner due to inequitable circumstances. *See Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236, 240 (3d Cir.1999); *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1094-95 (6th Cir.1996). The doctrine of equitable tolling applies in suits against the government as well as against private litigants. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), *reh'g denied*, 498 U.S. 1075 (1991). This Court has held that equitable tolling is read into the federal statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

Here the plaintiff strictly followed the instruction of the federal district court - apparently to his detriment. He should not be punished now for acting in good faith upon the directives of that court. Instead the doctrine of equitable estoppel should act as a safety net to prevent this case from being dismissed on such a harsh technicality. As Justice Frankfurter said, "[t]he heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness."*Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J concurring). It is a sad day indeed if those who defend democracy are unnecessarily deprived of the benefits of it. As Justice Black once said:

> Our Government should not by picayunish haggling over the scope of its promise, permit

> one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting). Another court put it more simply:

> To say to these appellants, "The joke is on you. You shouldn't have trusted us," is hardly worthy of our great government

Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970)

The actions of the Federal Circuit are in direct contravention with the holdings of this Court and the other Circuits as delineated herein. Accordingly, pursuant to Rule 10(a), certiorari should be granted on this issue.

II A Reservist Can Maintain a Cause of Action for Military Pay if He is the Victim of an Improper Discharge

The Court below by a 7-6 vote in *Martinez* and in the instant case, considered the question of whether 10 U.S.C. § 1552 was a money mandating statute. The majority incorrectly concluded that it was not. Judge Plager, who was joined by the Chief Judge and four other Judges, believed that 10 U.S.C. § 1552 was a money mandating statute.

10 U.S.C. § 1552 authorizes the Secretary to correct

records and provides for the payment of monetary claims "if necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1) The statute further provides that the Secretary:

> may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant.

10 U.S.C. § 1552(c).

The *Martinez* dissent wisely notes that compensation is required when a record is corrected, and for purposes of establish jurisdiction, 10 U.S.C. 1552 is a money mandating statute. *Martinez, supra.*, (Plager, J. dissenting).

Other Circuits have taken a different approach. The District of Columbia courts found that the purpose of correction boards includes providing reimbursement of compensation denied due to an incorrect or unjust record entry. *Larionoff v. United States*, 365 F.Supp. 140 (D.C.D.C.1973), *remanded on other grounds* 533 F.2d 1167, 175 U.S.App.D.C. 32, *cert. granted*, 429 U.S. 997 *aff'd*, 431 U.S. 864.

Additionally, in its opinion the court below found that the plaintiff improperly relied upon the Military Pay Act. This analysis ignores the fact that as a reservist, plaintiff was also required to perform 14 days active duty for training per year. 10 U.S.C. § 10147. This brings plaintiff within the scope of 37 U.S.C. 204(a). Plaintiff was a member of the

reserve component of a uniformed service. 37 U.S.C. § 101(3). 37 U.S.C. § 206 applies only to inactive duty while the active duty for training the plaintiff is required to perform is considered "active duty." 37 U.S.C. 101(a)(18).

Consequently, certiorari is appropriate under Rule 10(a) because of a divergent view between the circuits.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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NOTE: Pursuant to Fed. Cir. R. 47.6 this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

02-5030

CURTIS SHAFFER,
Plaintiff-Appellant

v.

UNITED STATES
Defendant-Appellee

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 00-CV-626

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED

Per Curiam (CLEVENGER, RADER and BRYSON, Circuit Judges).

AFFIRMED, See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

Jan Horbaly, Clerk

DATED March 8, 2004

Appendix 1

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-626C

(Filed September 28, 2001)

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CURTIS SHAFFER,	*
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Plaintiff	*
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v.	*
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	*
THE UNITED STATES	*
	*
Defendant	*
**********	*

John B. Wells, Slidell, LA for plaintiff

Heide L. Hermann, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D. C. , with whom were **Stuart E. Schiffer**, Acting Assistant Attorney General, **David M. Cohen**, Director, Commercial Litigation Branch, and **James M Kinsella**, Deputy Director, for defendant.

Opinion and Order

Appendix 2

This military pay case is before the court on defendant's motion to dismiss plaintiff's complaint as barred by the statute of limitations and for failure to state a claim upon which relief can be granted.

Facts

On July 24, 1983, plaintiff was hired by the Army Reserves (Reserves) as a "dual status technician." Complaint at ¶ III. As a condition of employment, plaintiff was required to maintain an Army Reserve unit military membership. On February 20, 1991, plaintiff was promoted to Master Sergeant (E-8). However on December 13, 1993, plaintiff was discharged from the Reserves with a general discharge under honorable conditions. Thereafter, on April 2, 1994, plaintiff was terminated from his civilian position with the Army for failure to maintain Reserve membership.

Plaintiff's November 19, 1944 application for correction of recrods to the Army Board for Correction of Military Records (ABCMR) was denied on March 4, 1998. The Army Discharge Review Board (DRB) alkso denied plaintiffs application.

On February 1, 1996, during the ABCMR review, plaintiff filed a complaint in the United States District Court for the Western District of Tennessee for Fifth Amendment relief and the set aside of his discharge. The district court's dismissal was affirmed by the United States Court of Appeals for the Sixth Circuit.

Plaintiff's October 20, 2000 complaint alleges: (1) violation of the Military Whistleblower Act, 10 U.S.C. § 1034, (2) violation of the Administrative Procedures Act

(APA), 28 U.S.C. § 702, (3) the ABCMR's improper failure to correct his record, and (4) the Army DRB's improper failure to upgrade his discharge.

Defendant's motion to dismiss argued that (1) the statute of limitations had elapsed prior to plaintiff's filing of his complaint and (2) the plaintiff failed o state a claim upon which relief can be granted. See Rule 12(b)(4) of the Rules of the United States Court of Federal Claims. (RCFC).

Discussion

A. Statute of Limitations

The statute of limitations, which is a jurisdictional requirement of this court, is six years. See 28 U.S.C. § 2501 (2001). Claims, such as this, alleging wrongful discharge, accrue on the date of discharge or separation from active duty. **Hurick v. Lehman**, 782 F.2d 984, 986 (Fed. Cir. 1986). Plaintiff was discharged from the Army Reserves on December 13, 1993, and filed this action more than six years later, on October 20, 2000, after the statute of limitations had lapsed. Plaintiff contends that the statute of limitations (1) was tolled by filing his district court complaint, and (2) should have been tolled equitably while he pursued administrative remedies.

Plaintiff contends that the six year statute of limitations was tolled by "constructive transfer" of the district court complaint, filed February 12, 1996. By "constructive transfer," he means that the district court although it in fact did not, should have transferred plaintiffs case to this court, pursuant to 28 U.S.C. § 1631, which provides:

[T]he court shall, if it is in the interest of

> justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which ti was actually filed in or noticed for the court from which it was transferred.

28 U.S.C. § 1631. However, transfer to overcome the statute of limitations may not be ordered if he transferee court would have had no subject matter jurisdiction over plaintiff's claim at the time it was filed in the transferor court. See **James v. Caldera**, 159 F.3d 573 (Fed. Cir. 1998).

Plaintiff's complaint in the district court could not have been entertained in this court, because he claimed racial discrimination based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981, a claim over which this court has no authority. See **Elkins v. United States**, 229 Ct. Cl. 607 (1981). Thus, plaintiff's case in district court was not eligible for transfer to this court under 28 U.S.C. §1631.

Plaintiff erroneously relies upon **Rothman v. United States,** 219 Ct. Cl. 595 (1979), for support of its "constructive transfer" theory. In **Rothman**, a bankruptcy trustee for an extended-care facility sued for reimbursement of Medicare services. After a Medicare Provider Appeal Committee denied full reimbursement, the trustee sought relief in district court. Plaintiff's timely-filed complaint was dismissed by the district court for lack of jurisdiction. **Id.** at 596. Two months later, and nine weeks after the statute of limitations had elapsed, plaintiff filed his action in the Court of claims. The **Rothman** court denied the motion to dismiss

because, had plaintiff made a transfer motion, it could and likely would have been granted. **Id**. at 596-97. The **Rothman** court justified departing from the statute on the grounds that the plaintiff had a very short time before the statue of limitations expired to file his complaint in the Court of Claims, as well as the plaintiff's "technical failure" to file the transfer motion. This precedent, while binding, never has been cited by the Court of Claims or Federal Circuit. In any event, there is no question that **Rothman** is distinguishable, because the Court of Claims in **Rothman** had subject matter jurisdiction over the complaint(s).

B. Equitable Tolling

Plaintiff contends that the statute of limitations was tolled equitable by plaintiff's pursuit of administrative remedies following the dismissal of the district court case. Statutory limitations on actions are construed strictly, particularly where the government is waiving sovereign immunity. **Irwin v. Dep't of Veteran's Affairs**, 498 U.S. 89, 95-96, 111 S. Ct. 452, 456-57 (1900)("Federal courts have typically extended equitable relief only sparingly."). The Supreme Court and the Federal Circuit have employed the doctrine under limited circumstances: fraud, **Bailey v. Glover**, 88 U.S. 342 347 (1874); concealment of facts by the defendant, **Japanese War Notes Claimants Ass'n of the Phillipines, Inc. v. United States**, 178 Ct. Cl 630, 373 F.2d 356 (1967); or timely filing a complaint in the wrong court, **Irwin v. Dept. of Veterans's Affairs**, 498 U.S. 89, 95-96, 111 S. Ct. 452, 458. Plaintiff here alleges no fraud, concealment of facts, or other governmental misconduct that would have prevented him form filing his claim within the statutory period specified by 28 U.S.C. § 2501. While permitting equitable tolling in

the circumstances above, the courts have precluded its use for "garden variety" neglect. See **Irwin,** 498 U.S. at 96, 111 S. Ct. at 458.

Plaintiff relies on decisions in other circuits to support his argument that pursing administrative remedies equitable tolls the statute. However, the Federal Circuit repeatedly has held that seeking permissive remedies, such as appeals to ABCMR or the DRB, do not toll the statute of limitations. See **Heisig v. United States**, 719 F.2d 1153, 1155 (Fed. Cir. 1983); see also **Hurick v. Lehman,** 782 F.2d 984, 987 (Fed. Cir. 1986).

C. Failure to State a Claim upon Which Relief Can be Granted

While the court's dismissal for lack of jurisdiction obviates the need to decide whether it should dismiss the complaint under RCFC 12(b)(4) for failure to state a claim upon which relief can be granted, the court reaches and decides the issue, in the alternative, in the interest of judicial efficiency in the event, on appeal, the United States Court of Appeals for the Federal Circuit overrules the jurisdictional decision.

Dismissal under RCFC 12(b)(4) is appropriate "when the facts asserted by the plaintiff do not entitle him to a legal remedy." **Boyle v. United States,** 200 F.#d 1369, 1372 (Fed. Cir. 2000). The court "must accept all well-pled factual allegations [in the complaint]as true and draw all reasonable inference in [he non-movant's] favor." **Id.** In this case, the relevant facts are not in dispute.

Plaintiff's claims do not, as they must, identify any

statute creating a "substantive right enforceable against the United States for money damages." **United States v. Testan**, 424 U.S. 392, 398, 96 S. Ct. 948, 953 (1976)("The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.") See also **Dehne v. United States**, 970 F.2d 890, 893f (fed. Cir. 1992)("Therefore, in order to state a claim under the Tucker Act, (plaintiff) must find a substantive right in the Constitution, as act of Congress, or an executive department regulation on which to base his claim that 'can fairly be interposed as mandating compensation by the federal Government for the damage sustained." (Quoting **United States v. Mitchell**, 463 U.S. 206, 216-17, 103 S. Ct. 2961, 2967-68 (1983)).

Plaintiff's complaint raises claims under (1) the Military Whistleblower Protection act, 10 U.S.C. §1034, (2) the Administrative Procedures Act, §702, (3) 10 U.S.C. §1552, and (4) 10 U.S.C. §1553. None of these statutes qualifies as money-mandating under **Testan**. See generally **Hernandez v. United States**, 38 Fed. Cl. 532 (1997)(no private cause of action existed in the Military Whistleblower Protection Act); see **Dehne**, 970 F.2d at 894 ("Thus, by its terms, section 1552(c) does not mandate pay at all. Rather it provides for appropriate discretionary payment by the Secretary in certain circumstances."); see **Murphy v. United States**. 993 F.2d 871, 874 (Fed. Cir. 1993)([T]he Claims Court has no authority to invoke the APA [in military pay cases]."). 10 U.S.C. §1553, which establishes the procedures for eview of a discharge or dismissal, creates no entitlement to payment from the government. Because none of the statutes identified by plaintiff mandates the payment of money by the government, plaintiff fails to state a claim upon

which relief can be granted.

Plaintiff's opposition to defendant's motion to dismiss requests leave to amend the complaint to add a claim under the Military Pay Act, 37 U.S.C. §§204 & 206, which ordinarily is deemed a money mandating statute for wrongful discharge or separation claims. [1]See **Holley v. United States**, 124 F.3d

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[1] 37.U.S.C. 204 (a) provides:

The following persons are entitled to the basic pay of the pay grade to which assign ed or distributed, in accordance with their years of service computed under section 205 of this title-

(1) a member of a uniformed service is on active duty; and
(2) a member of a uniformed service, or a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training with pay, or other full time duty provided by law, including participation in exercises or the performance of duty ....

37 U.S.C. 206(a) provides:

Under regulations prescribed by the Secretary concerned, and to the extent provided for by appropriations, a member of the National Guard or a member of a reserve component of a uniformed service who is not entitled to basic pay under section 204 of this title, is entitled to compensation, at the rate of 1/30 of the basic pay authorized for a member of a

1462, 1465 (Fed. Cir. 1997) (37 U.S.C. §204 applies to active duty servicemen, while §206 expressly applies to the Reserves and other inactive-duty members). See also **Palmer v. United States**, 168 F.3d 1301, 1314 (Fed. Cir. 1999). As a reservist, plaintiff falls under §206, which authorizes pay only of duties actually performed. See **Dehne**, 970 F.2d at 893 (37 U.S.C. §206 requires pay only "for the performance of such other equivalent training, instruction, duty, or appropriate duties as the Secretary may prescribe."), 37 U.S.C. §206(a)(1) & (2)(1994)(emphasis added). While the statute permits compensation for performance missed due to physical disability, it does not apply when the serviceperson fails to perform his duties, whether by election of the member or by decision of the service. **Palmer**, 168 F.3d at 1314. See also **Dehne**, 970 F.2d at 893. Therefore, plaintiff's nonperformance due to the service's decision to separate him involuntarily does not entitle him to be paid for his services.

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uniformed service of a corresponding grade entitled to basic pay- -

(1) for each regular period of instruction, or period of appropriate duty, at which the member is engaged for at least two hours, including that performed on a Sunday or holiday;
(2) for the performance of such other equivalent training instruction, duty or appropriate duties, as the Secretary may prescribe.

Plaintiff's prayers for nonmonetary relief, such as reinstatement to a position form which he was wrongfully removed, are predicated on his entitlement to pay under a money-mandating statute. **Palmer**, 168 F.3d at 1314 (citing **Holley**, 124 F.3d at 1465). As plaintiff has identified no applicable money-mandating statute, he is not entitled to such ancillary remedies.

CONCLUSION

The court concludes that plaintiff's claim is barred by the statute of limitations. Therefore, plaintiff's compliant is dismissed, without prejudice, for lack of jurisdiction. The Clerk of the Court shall enter judgment for defendant. No costs.

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS SHAFFER, JR.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
TOGO D. WEST, JR., Secretary of the Army)		
	)	
Defendant-Appellee.	)	

Before: KENNEDY, CONTIE, and MOORE, Circuit Judges.

Curtis Shaffer, Jr., proceeding pro se, appeals a district court judgment dismissing his amended civil rights complaint filed under 42 U.S. C. § 1981. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed R. App. P. 34 (a).

By way of background, in January, 1993, Shaffer was a dual-status military technician in the United States Army Reserve. He held the military grade of sergeant first class, and was also employed in the civilian position of staff operations and training specialist with the Reserves. On January 15, 1993, Shaffer's military commander issued a letter of reprimand finding that Shaffer had fraudulently worn the rank and insignia of a master sergeant and had drawn excess pay in the amount of $1186. The letter recommended that Shaffer be discharged from the Reserves. Following administrative proceedings, Shaffer was indeed discharged.

Shaffer was terminated from his civilian employment because that position was conditioned upon his maintaining membership in the Reserves.

Thereafter, Shaffer filed a complaint against the Secretary of the Army, alleging that the Army had violated his Fifth Amendment due process rights by discharging him from the Reserves without complying with Army regulations and procedures. He also argued that he was improperly separated from his civilian employment with the Department of Defense. In an amended complaint, Shaffer noted that his complaint should be construed as having been filed pursuant to 42 U.S.C. §1981. In addition, Shaffer argued that the defendant discriminated against him by giving him less favorable assignments, denying him training, and not placing a minority officer on his separation board to ensure a fair separation hearing. Shaffer requested damages and equitable relief, including reinstatement and back pay. The defendant moved to dismiss Shaffer's complaint for lack of subject matter jurisdiction, and Shaffer filed a cross-motion for summary judgment; each party filed numerous documents in support of their respective motions. Upon review, the district court dismissed Shaffer's complaint without prejudice, concluding that it lacked jurisdiction over Shaffer's claims. Shaffer has filed a timely appeal reasserting his claim that the defendants improperly discharged him from the reserves.

Initially, we note that Shaffer has expressly withdrawn his claim that his discharge violated due process, as well as his claim concerning his termination from his civilian employment. Thus, we shall consider these claims abandoned and not reviewable on appeal. *See Boyd v. Ford Motor Co.*, 948 F.2d. 283 (6thCir, 1991). *cert denied*, 503 U.S. 939 (1992).

Upon review, we affirm the district court's judgment. We construe the judgment as having granted summary judgment to the defendant, because it appears that the district court considered matters outside of the pleadings when it rendered its judgment. *See Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 182 (6th Cir. 1992), *cert denied*, 507 U.S. 966 (1993). Moreover, we conclude that the district court properly granted summary judgment to the defendant, *see Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994).

The defendant was entitled to summary judgment on Shaffer's claim that the defendant improperly discharged him from the Reserves. Even if we accept Shaffer's allegations as true, the defendant is not entitled to judgment as a matter of law because Shaffer can prove no set of facts in support of his claim that would entitle him to relief. *See Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert denied*, 498 U.S. 867 (1990). Shaffer is barred from pursuing this action in federal court as he is clearly seeking federal judicial review of a military personnel decision resulting in his discharge from the Reserves. *See Chappell v. Wallace*, 462 U.S. 296, 301-04 (1983). Shaffer may not invoke §1981 to review specific decisions by his superior officers because the relationship between enlisted military personnel and their superior officers is at the heart of the necessarily unique structure of the military establishment.
Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1007-11 (8th Cir. 1989). Shaffer's claim is not justiciable because he does not challenge the constitutionality of a military regulation or statute, nor does he seek limited review of any final agency action. *See Wood v. United States*, 968 F.2d 738, 739-40 (8th Cir. 1992).

Accordingly, we hereby affirm the district court's

judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF
THE COURT

_____

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CURTIS SHAFFER	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. 96-2204 G/A
	)	
TOGO D. WEST, JR.	)	
	)	
Defendant	)	
	)	

ORDER OF DISMISSAL

Plaintiff, Curtis Shaffer. brought this action against Togo D, West, Jr. the Secretary of the Army . Plaintiff allege that the Department of the Army violated his Fifth Amendment due process rights and its own regulations in discharging him from the United States Army Reserves and terminating him from a civilian employment position with the Department of Defense. He also alleges that the discharge and subsequent termination were motivated by racial discrimination. Plaintiff and defendant have filed cross-motions for summary judgment.

The undisputed facts in this case show that on January 15, 1991, plaintiff was a dual-status military technician in the

United States Army Reserves. Plaintiff held the military grade of Sergeant First Class (E-7). He was assigned to the 302nd Military Intelligence Company of the 125th Army Readiness Command in Mernphis, Tennessee. . He also was employed in the civilian position of staff operations and training specialist with the United States Army Reserves 124th Combat Support Hospital of the 81st Army Reserve Command in Perrine, Florida. On January 15, plaintiff's military commander issued a letter of reprimand finding that he had fraudulently worn the rank and insignia of a master sergeant and had drawn excess pay in the amount of $1186.00. The letter recommended that plaintiff be discharged from the Army Reserves. Plaintiff filed a rebuttal an February 15. 1993, denying any improper conduct: and requesting administrative review of the commander's decision. Between May 3 and December 1, 1993, the Army conducted administrative proceedings reviewing the recommended action and concluded that plaintiff should be discharged. On December 13, 1993. plaintiff was discharged from the Reserves.

Plaintiff's civilian employment with the Army was conditioned upon his maintaining membership in the Reserves. On February 23, 1994, the plaintiff received notice that his supervisor was proposing his termination because he had failed to maintain that membership. On April 2, 1994, plaintiff was terminated from employment with the Department of the Army.

On November 19, 1994, plaintiff submitted an application for correction of military records to the Army Board for Correction of Military Records (ABCMR). 10 U.S.C. § 1552(b). Plaintiff's application is still pending before the ABCMR.

Defendant seeks dismissal of plaintiff's claim of racial discrimination under 42 U.S.C. § 1981 as barred by sovereign immunity and by the exclusive remedy available to federal employees under Title IX. Defendant seeks dismissal o f plaintiff's claims related to violation of Army regulations and violation of Title VII on the grounds that plaintiff has failed to exhaust applicable administrative remedies. Plaintiff has essentially responded that exhaustion of those remedies is futile and should not be required.

" [E]nlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations. Chappel v. Wallace, 462 U . S . 296, 305 (1983). Furthermore, a member of the miiitary may not invoke Section 1981 to review specific decisions by his superior offices. Watson v. Arkansas National Guard, 886 F.2d 1004. 1010-11 (8th Cir. 1989). Equally importantly, plaintiff may not: maintain an action under section 1981 against the United States because the United States is protected by sovereign immunity. United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982).

Insofar as plaintiff contests his termination from his civilian employment with the federal government, he has no claim. A federal employee ' *s* exclusive remedy for illegal discrimination is the particular federal statute governing the particular invidious classification. 42 U.S.C. § 2000e-16 is the exclusive remedy for discrimination on the basis of race of sex. Brown v. General Services Administration,, 425 U.3. 920 (1976). The Age Discrimination in Employment Act, 29 U .S. C. § 633a is the exclusive remedy for federal employees alleging age discrimination. Paterson v. Weinberger , 644 F.2d 521, 525 (6th Cir. 1982). The Rehabilitation act. 29 U.S.C. § 791, 794a. is the exclusive remedy for handicapped discrimination in federal employment. Johnston

v. Horne, 875 F.2d 1415, 1420-21 (9th Cir. 1989); Boyd c. United States Postal Service, 752 F.2d 410 , 413 (9th Cir, 1985). Cf. Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir. 1988) (noting that the plaintiff did not dispute district court's dismissal of state law claims on basis that Rehabilitation Act: is the sole remedy for federal employees) Smith v. United States Postal Service, 766 F.2d 205, 207 n.2 (6th Cir. 14B5) (same); Smith v. United States Postal Service, 742 F,2d 257, 259-60 (6th Cir. 1984) (holding that Act requires exhaustion regardless of whether plaintiff invokes remedy under section 791 or section 794). Federal preference eligible employees contesting the validity of a termination must exhaust their remedies with the Merit System Protection Board (MSPB). See, Williams v. Rice, 983 F.2d 177, 180 (10th Cr. 1993).

Exhaustion of administrative remedies is a prerequisite before filing of an employment discrimination case. See generally, Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); Williams v. Rice, 983 F.2d at 180; Parsons *v*. Yellow Freight Systems, Inc., 741 F.2d 873 (6th Cir. 1984). For federal employees, exhaustion of administrative remedies is a jurisdictional prerequisite. Williams v. Rice, 983 P.2d at 180. Plaintiff admits that he has not exhausted his remedies under either Title VII or the MSPB procedures. Thus he cannot proceed with any claims of racial discrimination in employment.

Furthermore, the presently pending ABCMR procedure provides plaintiff an adequate remedy because that board, on review of his claims may correct his records and reinstate him to the Reserves. Plaintiff, however, contends that he need not exhaust that procedures. He essentially argues that he and his family have endured economic hardship while the ABCMR has had his case under review.

> Exhaustion of administrative remedies may not be required when (1) available remedies provide no "genuine opportunity for adequate relief, (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile and (4) in certain instances a plaintiff has raised a "substantial constitutional question. "

Guitard v. Secretary of the Navy, 967 F.2d 737, 741 (2nd Cir. 1992). Here, plaintiff cannot pass this threshold because he cannot show either a lack of genuine opportunity for adequate relief or irreparable injury.

> In Sampson v. Murray, 415 U.S. 61, 94 S.C. 937, 39 L.Ed.2d 166 (1974), the Supreme Court held that the injuries that generally attend a discharge from employment -1osc of reputation, loss of income and difficulty in finding other employment--do not constitute the irreparable harm necessary to obtain a preliminary injunction. 1d. at 89-92. 94 S.C. at 952-54. This reasoning applies with as much or greater force in the case of a military discharge. See Guerrera v. Scruggs, 94.2 F.2d 270 , 274-75 (4th Cir. 1991); Hartikka v. United States, 754 F. 2d 1516, 1518 (9th Cir. 1985) ; Chilcott v. Orr. 747 F.2d 29, 34 (1st Cir. 1984). Nor has Guitard shown either that administrative review would be futile for reasons other than the lack of merits of his case or that a substantial constitutional issue is involved. His claims thus do not fall within any of the recognized exceptions to the exhaustion doctrine.

Guitard, 967 F.2d at 742. Similarly, "[i]n this case as in Sanders, the consequence of delay for Guerrera, – postponement of his ability to obtain damages – is outweighed by the considerations of efficiency and agency expertise in requiring exhaustion." Guerrera v. Scruggs, 942 F.2d 270, 277 (4th Cir. 1991) [requiring exhaustion of ABCMR procedures].[2] Plaintiff's position is indistinguishable Guitard and Guerrera, and he has not demonstrated the futility of administrative exhaustion.

Accordingly, as plaintiff has exhausted neither the procedure for correcting his military records, nor his civilian employment administrative remedies with the Department of the Army, he is not entitled to relief, and his case is dismissed, without prejudice. Should plaintiff file a notice of appeal, it is hereby certified, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in

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[2] Plaintiff relies on Hickey v. Commandant of the Fourth Naval District, 461 F.Supp. 1085, 1094 (E. D. Penn 1978) to support his claim that he will suffer irreparable hardship.
Hickey, however, was a habeas corpus challenge to the Navy's decision to terminate the petitioner's enrollment in a Naval ROTC education program and activate him for full active duty in the Navy. The irreparable injury or hardship thus consisted of the petitioners completely serving his enlistment period. As the period would have expired before exhaustion of administrative remedies, the court considered his claim on the merits and denied them. This case is therefore distinguishable and does not support Shaffer's contention that economic hardship requires the court to excuse exhaustion of his administrative remedies.

this matter by plaintiff is taken in good faith and plaintiff may proceed on appeal in forma pauperis.

IT IS SO ORDERED this 7th day of March 1997.

JULIA SMITH GIBBONS, Chief Judge
UNITED STATES DISTRICT COURT

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

10 U.S.C. § 938. Art. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

10 U.S.C. § 1552. Correction of military records: claims incident thereto.

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or

reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid--

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment,

in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to--

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(g) In this section, the term "military record" means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 373, 605, 607, 643, and 873 of this title).

10 U.S.C. § 1557. Timeliness standards for disposition of applications before Corrections Boards.

(a) Ten-month clearance percentage.--Of the applications received by a Corrections Board during a period specified in the following table, the percentage on which final action by the Corrections Board must be completed within 10 months of receipt (other than for those applications considered suitable for administrative correction) is as follows:

For applications received during--	The percentage on which final Correction Board action must be completed within 10 months of receipt is–
the period of fiscal years 2001 and 2002	50
the period of fiscal years 2003 and 2004	60
the period of fiscal years 2005, 2006, and 2007	70
the period of fiscal years 2008, 2009, and 2010	80
the period of any fiscal year after fiscal year 2010	90

(b) Clearance deadline for all applications.--Effective October 1, 2002, final action by a Corrections Board on all

applications received by the Corrections Board (other than those applications considered suitable for administrative correction) shall be completed within 18 months of receipt.

(c) Waiver authority.--The Secretary of the military department concerned may exclude an individual application from the timeliness standards prescribed in subsections (a) and (b) if the Secretary determines that the application warrants a longer period of consideration. The authority of the Secretary of a military department under this subsection may not be delegated.

(d) Failure to meet timeliness standards not to affect any individual application.--Failure of a Corrections Board to meet the applicable timeliness standard for any period of time under subsection (a) or (b) does not confer any presumption or advantage with respect to consideration by the board of any application.

(e) Reports on failure to meet timeliness standards.--The Secretary of the military department concerned shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report not later than June 1 following any fiscal year during which the Corrections Board of that Secretary's military department was unable to meet the applicable timeliness standard for that fiscal year under subsections (a) and (b). The report shall specify the reasons why the standard could not be met and the corrective actions initiated to ensure compliance in the future. The report shall also specify the number of waivers granted under subsection (c) during that fiscal year.

(f) Corrections board defined.--In this section, the term "Corrections Board" means--

(1) with respect to the Department of the Army, the Army Board for Correction of Military Records;

(2) with respect to the Department of the Navy, the Board for Correction of Naval Records; and

(3) with respect to the Department of the Air Force, the Air Force Board for Correction of Military Records.

10 U.S.C. § 1558. Review of actions of selection boards: correction of military records by special boards; judicial review.

(a) Correction of military records.--The Secretary of a military department may correct a person's military records in accordance with a recommendation made by a special board. Any such correction may be made effective as of the effective date of the action taken on a report of a previous selection board that resulted in the action corrected in the person's military records.

(b) Definitions.--In this section:

(1) Special board.(A) The term "special board" means a board that the Secretary of a military department convenes under any authority to consider whether to recommend a person for appointment, enlistment, reenlistment, assignment, promotion, retention, separation, retirement, or transfer to inactive status in a reserve component instead of referring the records of that person for consideration by a previously convened selection board which considered or should have considered that person.

(B) Such term includes a board for the correction of military records convened under section 1552 of this title, if designated as a special board by the Secretary concerned.

(C) Such term does not include a promotion special selection board convened under section 628 or 14502 of this title.

(2) Selection board.--(A) The term "selection board" means a selection board convened under section 573(c), 580, 580a, 581, 611(b), 637, 638, 638a, 14101(b), 14701, 14704, or 14705 of this title, and any other board convened by the Secretary of a military department under any authority to

recommend persons for appointment, enlistment, reenlistment, assignment, promotion, or retention in the armed forces or for separation, retirement, or transfer to inactive status in a reserve component for the purpose of reducing the number of persons serving in the armed forces.

(B) Such term does not include any of the following:

(i) A promotion board convened under section 573(a), 611(a), or 14101(a) of this title.

(ii) A special board.

(iii) A special selection board convened under section 628 of this title.

(iv) A board for the correction of military records convened under section 1552 of this title.

(3) Involuntarily board-separated.--The term "involuntarily board-separated" means separated or retired from an armed force, or transferred to the Retired Reserve or to inactive status in a reserve component, as a result of a recommendation of a selection board.

(c) Relief associated with correction of certain actions.--(1) The Secretary of the military department concerned shall ensure that an involuntarily board-separated person receives relief under paragraph (2) or under paragraph (3) if the person, as a result of a correction of the person's military records under subsection (a), becomes entitled to retention on or restoration to active duty or to active status in a reserve component.

(2)(A) A person referred to in paragraph (1) shall, with that person's consent, be restored to the same status, rights, and entitlements (less appropriate offsets against back pay and allowances) in that person's armed force as the person would have had if the person had not been selected to be involuntarily board-separated as a result of an action the record of which is corrected under subsection (a). An action under this subparagraph is subject to subparagraph (B).

(B) Nothing in subparagraph (A) may be construed to

permit a person to be on active duty or in an active status in a reserve component after the date on which the person would have been separated, retired, or transferred to the Retired Reserve or to inactive status in a reserve component if the person had not been selected to be involuntarily board-separated in an action of a selection board the record of which is corrected under subsection (a).

(3) If an involuntarily board-separated person referred to in paragraph (1) does not consent to a restoration of status, rights, and entitlements under paragraph (2), the Secretary concerned shall pay that person back pay and allowances (less appropriate offsets), and shall provide that person service credit, for the period--

(A) beginning on the date of the person's separation, retirement, or transfer to the Retired Reserve or to inactive status in a reserve component, as the case may be; and

(B) ending on the earlier of--

(i) the date on which the person would have been so restored under paragraph (2), as determined by the Secretary concerned; or

(ii) the date on which the person would otherwise have been separated, retired, or transferred to the Retired Reserve or to inactive status in a reserve component, as the case may be.

(d) Finality of unfavorable action.--If a special board makes a recommendation not to correct the military records of a person regarding action taken in the case of that person on the basis of a previous report of a selection board, the action previously taken on that report shall be considered as final as of the date of the action taken on that report.

(e) Regulations.--(1) The Secretary of each military department shall prescribe regulations to carry out this section. Regulations under this subsection may not apply to subsection (f), other than to paragraph (4)(C) of that subsection.

(2) The Secretary may prescribe in the regulations under paragraph (1) the circumstances under which consideration by a special board may be provided for under this section, including the following:

(A) The circumstances under which consideration of a person's case by a special board is contingent upon application by or for that person.

(B) Any time limits applicable to the filing of an application for such consideration.

(3) Regulations prescribed by the Secretary of a military department under this subsection may not take effect until approved by the Secretary of Defense.

(f) Judicial review.--(1) A person seeking to challenge an action or recommendation of a selection board, or an action taken by the Secretary of the military department concerned on the report of a selection board, is not entitled to relief in any judicial proceeding unless the action or recommendation has first been considered by a special board under this section or the Secretary concerned has denied the convening of such a board for such consideration.

(2)(A) A court of the United States may review a determination by the Secretary of a military department not to convene a special board in the case of any person. In any such case, the court may set aside the Secretary's determination only if the court finds the determination to be--

(i) arbitrary or capricious;

(ii) not based on substantial evidence;

(iii) a result of material error of fact or material administrative error; or

(iv) otherwise contrary to law.

(B) If a court sets aside a determination by the Secretary of a military department not to convene a special board, it shall remand the case to the Secretary concerned, who shall provide for consideration by a special board.

(3) A court of the United States may review a

recommendation of a special board or an action of the Secretary of the military department concerned on the report of a special board. In any such case, a court may set aside the action only if the court finds that the recommendation or action was--

(A) arbitrary or capricious;

(B) not based on substantial evidence;

(C) a result of material error of fact or material administrative error; or

(D) otherwise contrary to law.

(4)(A) If, six months after receiving a complete application for consideration by a special board in any case, the Secretary concerned has not convened a special board and has not denied consideration by a special board in that case, the Secretary shall be deemed for the purposes of this subsection to have denied consideration of the case by a special board.

(B) If, six months after the convening of a special board in any case, the Secretary concerned has not taken final action on the report of the special board, the Secretary shall be deemed for the purposes of this subsection to have denied relief in such case.

(C) Under regulations prescribed under subsection (e), the Secretary of a military department may waive the applicability of subparagraph (A) or (B) in a case if the Secretary determines that a longer period for consideration of the case is warranted. Such a waiver may be for an additional period of not more than six months. The Secretary concerned may not delegate authority to make a determination under this subparagraph.

(g) Existing jurisdiction.--Nothing in this section limits--

(1) the jurisdiction of any court of the United States under any provision of law to determine the validity of any law, regulation, or policy relating to selection boards; or

(2) the authority of the Secretary of a military department to correct a military record under section 1552 of this title.

10 U.S.C. § 10147. Ready Reserve training requirements.

(a) Except as specifically provided in regulations to be prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, each person who is enlisted, inducted, or appointed in an armed force, and who becomes a member of the Ready Reserve under any provision of law except section 513 or 10145(b) of this title, shall be required, while in the Ready Reserve, to--

(1) participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training of not less than 14 days (exclusive of traveltime) during each year; or

(2) serve on active duty for training not more than 30 days during each year.

(b) A member who has served on active duty for one year or longer may not be required to perform a period of active duty for training if the first day of that period falls during the last 120 days of the member's required membership in the Ready Reserve.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which

instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

37 U.S.C. § 101 Definitions.
(3) The term "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service.

37 U.S.C. § 101 Definitions.
(18) The term "active duty" means full-time duty in the active service of a uniformed service, and includes full-time training duty, *annual training duty*, full-time National Guard duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary concerned.

37 U.S.C. § 204 Entitlement.
(a) The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title--
(1) a member of a uniformed service who is on active duty; and
(2) a member of a uniformed service, or a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training, training duty with pay, or other full-time duty, provided by law, including participation in exercises or the performance of duty under section 10302, 10305, 10502, or 12402 of Title 10, or section 503, 504, 505, or 506 of Title 32.

37 U.S.C. § 206 Reserves; members of National Guard: inactive-duty training.

(a) Under regulations prescribed by the Secretary concerned, and to the extent provided for by appropriations, a member of the National Guard or a member of a reserve component of a uniformed service who is not entitled to basic pay under section 204 of this title, is entitled to compensation, at the rate of 1/30 of the basic pay authorized for a member of a uniformed service of a corresponding grade entitled to basic pay--

(1) for each regular period of instruction, or period of appropriate duty, at which the member is engaged for at least two hours, including that performed on a Sunday or holiday;

(2) for the performance of such other equivalent training, instruction, duty, or appropriate duties, as the Secretary may prescribe; or

(3) for a regular period of instruction that the member is scheduled to perform
but is unable to perform because of physical disability resulting from an injury, illness, or disease incurred or aggravated--

(A) in line of duty while performing--

(i) active duty; or

(ii) inactive-duty training;

(B) while traveling directly to or from that duty or training (unless such injury, illness, disease, or aggravation of an injury, illness, or disease is the result of the gross negligence or misconduct of the member); or

(C) in line of duty while remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training.

32 C.F.R. § 723.3 Application for correction.

(b) Time limit for filing application. Applications for correction of a record must be filed within 3 years after discovery of the alleged error or injustice. Failure to file within the time prescribed may be excused by the Board if it finds it would be in the interest of justice to do so. If the application is filed more than 3 years after discovery of the error or injustice, the application must set forth the reason why the Board should find it in the interest of justice to excuse the failure to file the application within the time prescribed.

(2)

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No. 03-1635

In the Supreme Court of the United States

CURTIS SHAFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2501, a civil action filed in the Court of Federal Claims must be commenced within six years of the date on which the claim "first accrues." The question presented is whether a former service member's claims in a lawsuit challenging his discharge and seeking monetary relief under the Tucker Act, 28 U.S.C. 1491(a)(1), first accrued when he was discharged or when the military administrative board denied his application for review of the discharge.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not published in the *Federal Reporter* but is reprinted at 89 Fed. Appx. 265. The opinion of the United States Court of Federal Claims (Pet. App. 2-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2004. The petition for a writ of certiorari was filed on June 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a sergeant in the Army Reserves. He was also employed in a civilian position with the

Army, which was conditioned upon his maintaining membership in the Reserves. In December 1993, petitioner received a general discharge from the Reserves under honorable conditions. In April 1994, he was terminated from his civilian job. Pet. App. 3.

2. Petitioner sought review of his discharge by the Army Discharge and Review Board (ADRB) and the Army Board for Correction of Military Records (Army Correction Board or Board). Before either board had ruled, petitioner filed a complaint in the United States District Court for the Western District of Tennessee, challenging his military discharge and his civilian-job termination. Petitioner alleged that both actions violated due process and Army regulations and were racially discriminatory, in violation of 42 U.S.C. 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. In March 1997, the district court dismissed petitioner's suit without prejudice, holding that (a) military personnel cannot sue their superior officers for damages; (b) Section 1981 actions cannot be maintained against the government; (c) Title VII provides the exclusive remedy for federal civilian employees' claims of racial discrimination; and (d) petitioner failed to exhaust either civilian or military administrative remedies. In June 1997, the ADRB denied petitioner relief, and in March 1998, the Army Correction Board did the same. Pet. App. 3, 16-22; Pet. 2.

In May 1998, the Sixth Circuit affirmed the decision of the district court. The court of appeals noted that petitioner had abandoned his challenge to the termination of his civilian employment and his due process challenge to his military discharge, and held that petitioner's non-constitutional challenge to his military discharge was not justiciable. Pet. App. 12-15; Pet. 3.

3. In October 2000, more than two years after the Sixth Circuit affirmed the dismissal of his suit and nearly seven years after his discharge from the Reserves, petitioner filed suit in the Court of Federal Claims. Pet. App. 3. He alleged (a) that his military discharge violated the Military Whistleblower Protection Act, 10 U.S.C. 1034, and the Administrative Procedure Act (APA), 5 U.S.C. 702; (b) that the Army Correction Board improperly failed to correct his records; and (c) that the ADRB improperly failed to upgrade his discharge. Pet. App. 3-4.

The court dismissed the suit, Pet. App. 2-11, finding it untimely under 28 U.S.C. 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Relying on the Federal Circuit's decision in *Hurick* v. *Lehman*, 782 F.2d 984 (1986), the court concluded that petitioner's wrongful-discharge claim accrued at the time of his discharge in 1993. Pet. App. 4-6. The court also rejected petitioner's contention that the statute of limitations should have been equitably tolled while he pursued his administrative remedies. *Id.* at 6-7. As an alternative basis for its decision, the court held that petitioner had failed to state a claim for relief, because he had not identified a "money-mandating" statute to support his claim under the Tucker Act, 28 U.S.C. 1491(a)(1), as required by *United States* v. *Testan*, 424 U.S. 392 (1976). Pet. App. 7-11.

4. Petitioner filed an appeal to the Federal Circuit, which stayed the case pending its decision in *Martinez* v. *United States*, 333 F.3d 1295 (2003) (en banc), cert. denied, 124 S. Ct. 1404 (2004). Pet. 3.

In June 2003, the Federal Circuit decided *Martinez*, which adhered to that court's earlier decision in *Hurick* and held that a claim under the Tucker Act for monetary losses sustained from a military discharge accrues on the date of discharge and is barred if suit is not brought within six years of that date. 333 F.3d at 1302-1310. Holding that resort to the Army Correction Board was not mandatory, *Martinez* rejected the contention that the claim did not accrue until the date of the Board's decision, and concluded that the Board's decision did not give rise to a separate cause of action with a new limitations period. *Id.* at 1302-1315. *Martinez* also held that the doctrine of equitable tolling did not apply in that case. *Id.* at 1315-1319.

After *Martinez* was decided, the Federal Circuit affirmed the dismissal of petitioner's suit without opinion. Pet. App. 1.

ARGUMENT

Martinez considered and rejected the principal contention raised by petitioner, and is controlling on the question whether his suit is time-barred under 28 U.S.C. 2501. This Court denied certiorari in *Martinez* only seven months ago, see *Martinez* v. *United States*, 124 S. Ct. 1404 (2004) (No. 03-418), and there is no reason for the Court to review the non-precedential order in this case.[1]

1. Like the petitioner in *Martinez*, petitioner here contends (Pet. 3-5) that the Federal Circuit's decision in *Martinez* is incorrect and conflicts with decisions of other courts of appeals holding that exhaustion of a correction-board remedy is mandatory and that a

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[1] We are forwarding to counsel for petitioner a copy of our brief in opposition in *Martinez*.

board's decision is reviewable under the APA even though the limitations period for a challenge to the military's underlying decision has expired.[2] As our brief in opposition in *Martinez* explained (at 9-10), that contention is without merit. The Federal Circuit in *Martinez* correctly distinguished the APA cases on the ground that they did not involve a claim for money damages. See 333 F.3d at 1313. Indeed, the court in *Martinez* observed that this distinction was recognized by "the very cases on which [the petitioner] rel[ied]." *Ibid.* See *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 72 (2d Cir. 1987); *Smith* v. *Marsh*, 787 F.2d 510, 511-512 (10th Cir. 1986); *Dougherty* v. *United States Navy Bd. for Correction of Naval Records*, 784 F.2d 499, 501-502 & n.10 (3d Cir. 1986); *Geyen* v. *Marsh*, 775 F.2d 1303, 1308-1309 (5th Cir. 1985).

Also like the petitioner in *Martinez*, petitioner here contends (Pet. 10-11) that the statute governing correction boards, 10 U.S.C. 1552, is a "money-mandating" statute that supports Tucker Act jurisdiction. See *United States* v. *Testan*, 424 U.S. at 398-400. As the court explained in *Martinez*, however, the only pay that a discharged service member can claim is the military pay he would have received but for the challenged discharge. See 333 F.3d at 1303, 1311, 1314-1315. It is thus the military-pay statute, not Section 1552, that is the money-mandating statute.

For reservists like petitioner, moreover, the applicable pay statute is 37 U.S.C. 206—not, as petitioner contends (Pet. 11-12), 37 U.S.C. 204, which applies only to full-time active-duty soldiers, see *Holley* v. *United*

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[2] The same contention is raised in the certiorari petition in *Smalls* v. *United States*, No. 03-10695 (filed May 25, 2004), which is also pending before the Court.

States, 124 F.3d 1462, 1465 (Fed. Cir. 1997). And the Court of Federal Claims correctly held (Pet. App. 9-10) that Section 206 provides pay for reservists only for drills actually attended or active duty actually performed; it does not support petitioner's claim for payment for services that he did not render because of his discharge. See *Palmer* v. *United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999). Petitioner would therefore not be entitled to relief even if his suit were timely. See Pet. App. 7-11.

2. The contentions raised by petitioner that were not addressed in our brief in opposition in *Martinez* are equally without merit, and likewise do not warrant further review.

a. Relying on the district court's dismissal of his earlier suit for failure to exhaust administrative remedies (Pet. App. 16-22), petitioner contends (Pet. 7-8) that the law-of-the-case doctrine required the Federal Circuit to hold that exhaustion of his Army Correction Board remedy was mandatory. Law of the case, however, applies only to decisions of the same court or of coor dinate courts; it does not require a court of appeals to follow a district court's decision on a question of law. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). That doctrine, moreover, "posits that when a court decides upon a rule of law, th[e] decision should continue to govern the *same issues* in subsequent stages in the *same case*." *Id.* at 816 (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983)) (emphasis added). Here, petitioner's complaint in the Court of Federal Claims initiated a different lawsuit that alleged different facts and sought different relief under different statutes. Compare Pet. App. 13 (earlier case) (due process and 42 U.S.C. 1981) with Pet. App. 8 (this case) (Military Whistleblower Protection

Act (10 U.S.C. 1034), APA (5 U.S.C. 702), and 10 U.S.C. 1552 and 1553).

b. Petitioner also contends (Pet. 9-10) that the statute of limitations should have been equitably tolled, because he "followed the instruction" (Pet. 9) of the District Court for the Western District of Tennessee by exhausting his Army Correction Board remedy. Applying settled legal principles to the facts of this case, the Court of Federal Claims rejected that contention (Pet. App. 6-7), and the Federal Circuit correctly affirmed its decision. *Martinez* declined to decide whether the limitation period in 28 U.S.C. 2501 could ever be subject to equitable tolling, because the plaintiff had not made a sufficient showing to warrant tolling even if it were available. See 333 F.3d at 1315-1319. As the court observed, this "narrow doctrine" requires "a compelling justification for delay, such as 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Id.* at 1318 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Petitioner cannot provide any justification for equitable tolling, much less a compelling one, particularly since the Army Correction Board denied his application nearly two years before the expiration of the six-year limitation period. See Pet. App. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2004